Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

S.E., *et al.*,

Petitioners

v.

GRANT COUNTY BOARD OF EDUCATION, *et al.*,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the reasonableness standards set forth in *New Jersey v. T.L.O.* apply to seizures of the student's person in the public school context?

How states' mandatory reporting requirements for suspected criminal activity impact Fourth Amendment protections for students in public schools?

What Fourth Amendment protections are required for students in public schools when a school administrator seizes a student for the purpose of extracting an incriminating statement to be used for law enforcement purposes?

Whether school children should be afforded immunity for statements made to school officials in the school discipline context?

What Fifth Amendment protections are required for students in public schools when school officials require students to provide incriminating statements for law enforcement purposes?

What Fifth Amendment protections are required for students when a school administrator is required to report suspected criminal activity to law enforcement and then requires a student to provide an incriminating statement to be used for law enforcement purposes?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellants and Petitioners: S.E., as next friend of A.E., a minor; T.E., as next friend of A.E., a minor; A.E., a minor by and through her next friends S.E. and T.E.

Defendants-Appellees and Respondents: Grant County Board of Education; Donald Martin, in his capacity as Superintendent and individually; Ronald Livingood, in his capacity as Principal of Grant County Middle School and individually; James Lacey, in his capacity as Assistant Principal of Grant County Middle School and individually; and Celisa Edmondson, in her capacity as Health Nurse of Grant County Middle School and individually.

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PETITION FOR A WRIT OF CERTIORARI

S.E., T.E., and A.E. respectfully petition for a writ of certiorari to review the opinion and order of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion and order of the U.S. Court of Appeals for the Sixth Circuit, dated October 10, 2008 is officially reported at 564 F.3d 633, and is reproduced at App. A, 1a--24a. The order of the U.S. Court of Appeals for the Sixth Circuit denying rehearing, dated October 24, 2008 is reproduced at App. B, 1b—2b.

The Memorandum Opinion and Order of the U.S. District Court for the Eastern District of Kentucky, Covington division, dated October 17, 2007, is officially reported at 522 F. Supp. 2d 826, and is reproduced at App. C, 1c--18c.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on October 10, 2008, and the order of the U.S. Court of Appeals denying rehearing was entered on October 24, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order denying rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision involved are 42 U.S.C. § 1983 and 42 U.S.C. § 1988. These relevant statutory provisions are reproduced at App. D, 1d--3d.

STATEMENT OF THE CASE

This action arises from a series of incidents that occurred on the last day of the 2006 school year at Grant County Middle School, in Grant County, Kentucky. The Plaintiffs are the parents of A.E., who was a seventh grade student at Grant County Middle School in 2005, and A.E. They allege that A.E.'s rights under U.S. Const. Amend. IV and U.S. Const. Amend. V were violated by school officials when A.E. was summoned into the assistant principal's office for the purpose of taking a confession from A.E. to be provided to the school's resource officer ("SRO"), a Grant County Deputy Sheriff under contract to the school district. The Plaintiffs further allege that the Defendants conspired to deny A.E.'s Fourth and Fifth Amendment rights, and further refused or neglected to prevent deprivation of those rights. The Plaintiffs also raised state law claims for negligence, and negligent supervision.

A.E. suffered from attention deficit hyperactivity disorder and bipolar disorder, and during her seventh grade year at Grant County Middle School went daily to the school nurse for her midday administration of Adderall to control her condition. On May 26, 2005 (the last day of the school year), A.E. went to the nurse as usual to get

her midday dosage. As she began to leave, the school nurse noticed that four tablets remained in A.E.'s medication container, and the nurse, contrary to school policy and state regulations, returned the medication to A.E. in its original container.

A.E. did not have access to her school locker, did not have a purse or book bag into which to place the medication, and therefore gave the medication to her teacher when she went to her next class. As that class ended, the teacher gave A.E. the medication back, and A.E. went to her last class of the day. During that class, one of her fellow students noticed the medication and asked A.E. for one of the tablets. After refusing several requests, A.E. relented and gave one of the tablets to the student.

Two or three days after the incident, Mr. Lacey called T.E. (A.E.'s mother) and told her to expect a sheriff's deputy (actually the SRO) over the summer to come to their home to interview A.E. This interview never occurred, as the SRO had surgery during the summer. Upon the A.E.'s return to school on August 11, 2005, James Lacey, the school's assistant principal, knowing that the interview did not occur during the summer, called A.E. into his office and commanded her to write a statement of the events that happened on the last day of the prior school year and to sign the statement. Mr. Lacey did not inform A.E. that she was free to leave his office, that she could refuse to write the statement, or that the statement could and/or would be used against her in a juvenile proceeding.

Mr. Lacey did not place a copy of this statement into A.E.'s school file, but rather, gave the statement directly to the SRO. In fact, approximately two weeks after he took A.E.'s confession, Mr. Lacey called A.E. and the other student involved to his office and asked them to tell him what had happened on the last day of school in conformance with the requirements this Court laid down in *Goss v. Lopez*, 419 U.S. 565 (1975).

The SRO subsequently charged A.E. with violation of Kentucky Revised Statutes § 218A.1411 (trafficking in a controlled substance within 1000 yards of a school building). The SRO conducted no further investigation into the matter, using the confession extracted by Mr. Lacey as the charging document and only evidence against A.E.

The SRO confirmed that it was the long-standing practice within the school district for administrators to collect confessions from students and then to hand them over to her to bring charges against those students. The SRO also confirmed that, if she had interrogated or asked A.E. to provide a written statement, she would have had to call A.E.'s parents, provide A.E. with *Miranda* warnings, and allow the student to have counsel present during any questioning.

Confronted with the prospect of adjudication as a juvenile offender, A.E. accepted diversion pursuant to Kentucky Revised Statutes § 610.030. A.E. successfully completed her diversion agreement, never appeared in court, was never taken into custody, and no formal court record was ever created concerning the charges against her.

The complaint in this matter was filed on June 22, 2006. After discovery was completed, the

Plaintiffs and the Defendants filed competing motions for summary judgment in the district court. The Plaintiffs voluntarily dismissed Counts I, II, VII, VIII, XI, XIII, XIV, and XV of their complaint in their motion for partial summary judgment. Plaintiffs now abandon Count III of their complaint which raised claims for disability discrimination pursuant to 29 U.S.C. § 794, § 504 of the Rehabilitation Act.

The Grant County Board of Education (the Grant County Schools) and the Defendants named in both their official and individual capacities are subject to the provisions of 42 U.S.C. §§ 1983 and 1988 for actions taken under color of law in deprivation of rights guaranteed by the U.S. Constitution or Federal statutes. 42 U.S.C. §§ 1983 and 1988.

The issues in this Petition arise from the holing of the U.S. Court of Appeals for the Sixth Circuit in which the court found that the Plaintiffs were correct on the sole issue before the Court of Appeals, but via which the court also found that no constitutional deprivation had taken place, and therefore, the Defendants were entitled to summary judgment on alternative grounds not considered by the district court. The district court granted the Defendants summary judgment holding that *Heck v. Humphrey*, 512 U.S. 477 (1994) barred Plaintiffs' Fourth and Fifth Amendment claims, and by extension, their claims for conspiracy and failure or neglecting to prevent. The U.S. Court of Appeals for the Sixth Circuit held that pursuant to its decision in *Powers v. Hamilton County Public Defenders Comm'n.*, 501 F.3d 592, *cert. denied* 129 S. Ct. 44, 172 L. Ed. 2d 21, 2008

U.S. LEXIS 6630, 77 U.S.L.W. 3196 (U.S. 2008), that Plaintiffs' Fourth and Fifth Amendment claims were not barred by the holding of this Court in *Heck*. However, the court further found that the actions of Mr. Lacey were reasonable, no Fourth or Fifth Amendment deprivations occurred, and affirmed the district court's grant of summary judgment to the Defendants on those grounds.

S.E., T.E., and A.E. petition this Court for review of the Sixth Circuit's decision holding that no Fourth or Fifth Amendment deprivation occurred in this case.

REASONS FOR GRANTING THE PETITION

In this Court's landmark decision, *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n. 7 (1985), the Court specifically left open the question of what the Fourth Amendment to the United States Constitution requires when a school official conducts a search and/or seizure of a student when law enforcement is involved.[1] Not only is this a case in which the seizure of a student was carried out in conformance with a long-standing custom and/or practice by which school officials extracted confessions from students for the purpose of

[1] "We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies. and we express no opinion on that question. Cf. Picha v. Wielgos, 410 F.Supp. 1214, 1219-1221 (ND. Ill. 1976) (holding probable cause standard applicable to searches involving the police)."

providing them to law enforcement to use as charging documents, it is also one in which local school officials are required by state statute to report suspected crimes that occur on campus to law enforcement.[2]

I. THE SIXTH CIRCUIT ERRED IN HOLDING THAT ASSISTANT PRINCIPAL LACEY ACTED REASONABLY IN LIGHT OF FOURTH AMENDMENT PRECEDENT PERTAINING TO SCHOOL SEARCHES AND/OR SEIZURES.

A. The Sixth Circuit's Application of the "Reasonableness" Test to the Case at Bar Fails to Take Into Account the Interplay of State Statutes Requiring Reporting of Certain Criminal Acts to Law Enforcement.

Kentucky Revised Statutes § 158.154 requires a school principal who "...has a reasonable belief that an act has occurred on school property or at a school-sponsored function involving... possession of a controlled substance in violation of the law..." to immediately report the act to the appropriate law enforcement agency. In addition. Kentucky Revised Statutes § 158.155(4), requires *inter alia*, any school administrator, teacher, or other employee of a public or private school who knows or has reasonable cause to believe that sale of controlled substances or a felony offense under

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[2] *See* Kentucky Revised Statutes § 158.154 and § 158.155.

Kentucky law has occurred to promptly make a report to the local police department, sheriff, or the Kentucky State Police. Thus, under Kentucky statutes, school officials are required to report conduct such as occurred in A.E.'s case to law enforcement. However, these statutes do not confer criminal investigatory powers upon school officials.

At least 12 other states have similar reporting requirements. Alabama requires reporting of violent disruptive incidents to the county sheriff. Ala. Code § 16-1-24. South Carolina requires reporting of activity that may result or results in injury or serious threat of injury to law enforcement authorities. S.C. Code Ann. § 59-24-60. Arkansas requires reporting of any act of violence or crime involving a deadly weapon on school property to law enforcement. Ark. Stat. Ann. § 6-17-113. Georgia law provides that school administrators, disciplinary hearing officers, panels, tribunals of school officials, or local boards of education may report any alleged criminal acts by a student to law enforcement. Ga. Code Ann. § 20-2-756. Illinois requires school principals to utilize the proper law enforcement agency when the safety and welfare of students and teachers are threatened by illegal use of drugs and alcohol. 105 Ill. Comp. Stat. § 5/10-21.4a. Kansas requires each board of education to adopt a policy requiring an immediate report to state or local law enforcement of suspected or known felonies or misdemeanors involving the possession, use or disposal of explosive, firearms, or other weapons. Kan. Stat. Ann. § 72-89(b)03. Louisiana prohibits parish and city school boards from adopting any rule, regulation, or other policy forbidding or

discouraging school employees from reporting apparent criminal activity by any person to any appropriate law enforcement authority. La. Rev. Stat. §17.81.7. Mississippi requires school employees to report any unlawful activity that has occurred or may have occurred on school property to the superintendent or his designee, who is required to notify the appropriate law enforcement officials. Miss. Code Ann. § 37-11-29. Missouri requires reporting of 25 specific crimes or suspected crimes to the appropriate law enforcement agency. Mo. Rev. Stat. § 160.261. Nebraska requires the school principal or designee to report any suspected or known student violation of the Nebraska Criminal Code. Neb. Rev. Stat. § 79-293. New Hampshire requires reporting of any act of theft, destruction, or violence to law enforcement authorities. N.H. Rev. Stat. Ann. § 193-D.4. Texas requires the school principal or designee to report specified suspected student crimes to the appropriate law enforcement agency. Tex. Educ. Code Ann. § 37.015.

The sixth circuit, while recognizing that Mr. Lacey acted in conformance with Kentucky law requiring him to report A.E.'s suspected criminal act to law enforcement, looked only at the issue of whether it was reasonable for him to interview A.E. for school disciplinary purposes. The court failed to recognize Mr. Lacey's admission that he did not have a school discipline related purpose for interviewing A.E., and further, ignored the fact that Mr. Lacey did not even retain a copy of the confession he extracted from A.E. in her school file. Additionally, the sixth circuit failed to weigh the fact that approximately a week after Mr. Lacey

extracted the confession from A.E., he called her into his office and provided her with minimal due process prior to suspending her from school for one day. And, the court certainly did not consider the requirements of Kentucky Revised Statutes §§ 158.145 and 158.155 in light of A.E.'s Fourth Amendment Rights.

B. The Circuits are Inconsistent in the Application of the Reasonableness Test to Seizures of Students.

In *Picha v. Wielgos*, 410 F.Supp. 1214, 1219-1221 (ND. Ill. 1976), the district court held that the probable cause standard applied to the search of a student involving the police. When this Court cited *Picha* in *T.L.O.* it clearly foreshadowed that when school officials were acting in conjunction with or at the behest of law enforcement, the full panoply of Fourth Amendment protections would apply in the school context.

This Court further refined the contours of the reasonableness inquiry pertaining to student searches in *Veronia School Dist. 47j v. Acton*, 515 U.S. 646, 652-653 (1995) by framing the reasonableness inquiry as balancing an individual's privacy interests against legitimate governmental interests. However, reasonableness in all of this Court's decisions and those of the various circuits is framed within the context of maintenance of "the swift and informal disciplinary procedures that are needed" in the school context." *Veronia*, 515 U.S. at 653 (quoting *T.L.O.*, 469 U.S. at 340-341). None of this Court's or the circuit courts' decisions applying the reasonableness standard in the school context

have considered the balancing required when the purpose of a search or seizure was to develop evidence for use by the police. And, none of this Court's or the circuit courts' decisions have considered the impact of state statutes requiring reporting of known or suspected criminal activities to law enforcement.

Circuits considering the reasonableness of a seizure of a student have attempted to develop parameters by which to measure whether the seizure was reasonable. For example, the court in *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995) considered the seizure at issue in light of all the circumstances. But, the ninth circuit took a different approach, considering the reasonableness of a student seizure "... in light of the educational objectives [the school vice-principal] was trying to achieve." *Doe v. Haw. Dept. of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003). And, the tenth circuit looked to the temporal context to determine the reasonableness of a student seizure: "Context is critical to reasonableness analysis; a seizure may be reasonable to break-up an ongoing fight, but it may be unreasonable ten hours after the fight occurred." *Couture v. Bd. of Educ. of the Albuquerque Pub. Schs.*, 553 F.3d 1243, 1251 (10th Cir. 2008).

C. The Circuits are Split as to Whether Students Have Fourth Amendment Protections When Summoned to the School Offices for Questioning.

Several circuits have considered the question of whether the standards set out in *T.L.O.* apply to

the seizure of a student's person, and there is a split among the circuits on this issue. In *Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir. 1989), the court applied the *T.L.O.* standards to the seizure of a student: "We believe that the same considerations which moved the Supreme Court to apply a relaxed Fourth Amendment Standard in cases involving schools searches support applying the same standard in school seizure cases." *Accord Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1014 (7th Cir. 1995).

In *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995), the fifth circuit applied the *T.L.O.* reasonableness standard in a case involving a student seizure: "[W]hile school officials are subject to the limitations of the Fourth Amendment, the reasonableness of the seizures must be determined in light of all the circumstances...." But, the fifth circuit reversed itself five years later: "[I]t is not at all clear that [students] have some privacy right not to be summoned to and detained in a school official's office for questioning on matters of school discipline." *Milligan v. City of Slidell*, 266 F.3d 652, 655 (5th Cir. 2000).

One issue, however, is absent from all of the above cases. No court has examined the application of the Fourth Amendment when the purpose of the seizure is to extract a confession from a student for use by law enforcement.

This Court should grant certiorari to consider (1) whether the reasonableness standards set forth in *T.L.O.* apply to seizures of students; (2) how the mandatory reporting requirements of the various states impact the analysis in terms of

Fourth Amendment consideration; (3) what the standards are for seizures of students when the purpose of the seizure is to develop evidence for law enforcement purposes; and (4) whether the seizure of A.E. in this case was reasonable in light of those standards.

II. THE SIXTH CIRCUIT ERRED IN FINDING THAT NO FIFTH AMENDMENT DEPRIVATION OCCURRED IN THE CASE AT BAR.

Under this Court's precedent, inmates in the prison disciplinary context have more Fifth Amendment protections than the sixth circuit held applied to A.E., an eighth grade student. In *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), this Court held that an individual is privileged not to answer questions put to him in any "proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." The *Lefkowitz* Court further held that, though prison disciplinary proceedings are not criminal proceedings, if an inmate were required to furnish testimonial evidence that might later incriminate him, he must be offered "whatever immunity is required to supplant the privilege" and may not be required to "waive such immunity." *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976) (citing *Lefkowitz*, 414 U.S. at 85) (*accord Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Men v. Sanitation Comm'r.*, 392 U.S. 280 (1968)).

The sixth circuit looked only at the question of whether it was reasonable for a school

administrator to question a student about a suspected breach of school rules or violation of the law in reaching its decision. It did not look to the issue of how the information gathered from the student was to be used. And, because it found Mr. Lacey's questioning of A.E. to be reasonable, it held that no Fifth Amendment deprivation had occurred. In fact, the sixth circuit devoted only one paragraph of its opinion to A.E.'s Fifth Amendment claims, and cited only to cases involving school discipline issues. None of the cases cited by the sixth circuit considered the gravamen of Fifth Amendment rights when police were involved or when incriminating statements were elicited for use in criminal proceedings.

A.E. certainly gave unwarned testimonial evidence against herself at the insistence of Mr. Lacey when she provided a written statement at his command. Without doubt, the statement A.E. made would lead a reasonable observer to believe that it would be available for use at a later trial, and thus, was testimonial evidence. *See Crawford v. Washington*, 514 U.S. 36 (2004). Her unwarned statement was the only evidence used against A.E. to bring charges against her in juvenile court.

A. State Courts Considering Fifth Amendment Protections are Split as to the Degree of Protection to be Afforded a Student Interrogated by School Officials.

Most of the authority regarding Fifth Amendment protections in the school context comes from state court decisions, as in most instances, the

students involved are juveniles and are subject to state court juvenile adjudication. One theme that is clear throughout the various state court decisions is that when school officials are acting in concert with the police to develop evidence that a crime has been committed, students must be afforded the full array of Fifth Amendment protections including *Miranda* warnings. Several state courts have held that *Miranda* warnings are not required when school officials question a student about possible criminal activity so long as the school officials are not acting as agents of the police (i.e., at the behest of or in concert with the police). *See In re Harold S.*, 731 A.2d 265 (R.I. 1999); *New Hampshire v. Tinkham*, 719 A.2d 580 (N.H. 1998); *Commonwealth v. Jeffrey Snyder*, 597 N.E.2d 1363 (Ma. 1992); *In the Matter of Krystal Nicole Phillips*, 497 S.E.2d 292 (N.C. App. 1998); *In the Matter of Appeal in Navajo County Juvenile Action No. JV91000058*, 901 P.2d. 1247 (Ariz. App. 1995). However, in each of the state court decisions above, the courts have made clear that when school officials act as agents of the police, *Miranda* warnings and all Fifth Amendment protections that would be required if police conducted an interrogation apply.

In *State ex rel. Juvenile Department of Lane County v. Killitz*, 651 P.2d 1382, 1384 (Or. Ct. App. 1982), the court held that where the student was summoned to the principal's office for police questioning and (1) was not advised he was free to leave, (2) was questioned as a suspect, and (3) did not voluntarily come to the principal's office to be questioned, his unwarned confession could not be admitted in a juvenile delinquency proceeding. *See*

also In re: Jorge D., 43 P.3d 605 (Ariz. App. 2002); *State v. John Doe*, 948 P.2d 166 (Ida. App. 1997).

The Supreme Court of New Hampshire considered when school officials' actions established that those officials were acting as an instrument or agent of the police in the case of the state of *New Hampshire v. Joseph Heirtzler*, 789 A.2d 634 (N.H. 2001). In *Heirtzler* the New Hampshire Supreme Court determined that while school officials may be afforded some flexibility to resolve problems affecting the educational environment, enforcing the law or investigating criminal matters falls outside the scope of a school official's administrative authority:

> Because they are not law enforcement officers, when school officials search for contraband in order to foster a safe and healthy educational environment, they are afforded greater flexibility than if a law enforcement officer performs the same search. If school officials agree to take on the mantle of criminal investigation and enforcement, however, they assume an understanding of constitutional criminal law equal to that of a law enforcement officer. In such circumstances, even if school officials claim their actions fall within the ambit of their administrative authority, they should be charged with abiding by the constitutional protections required in criminal investigations.

Id. at 640 (citations omitted).

In *State v. V.C. and R.S.*, 600 So.2d 1280 (Fla. App. 1992), however, the court held that where a school assistant principal obtained written confessions from two students after he had notified police of the alleged criminal activity and where he warned the students that the police might become involved, no *Miranda* warnings were required, and the students' confession could be used in against them in juvenile proceedings. And, in *State v. J.T.D.*, 851 So.2d 793 (Fla. App. 2003), the court held that where a school security officer was present during questioning by the school's principal and assistant principal but where the security officer did not participate in the questioning, and where the questioning regarded violation of the student code of conduct, *Miranda* warnings were unnecessary. The court did, however, state that if a law enforcement officer participated in the interrogation, *Miranda* warnings were required. *Id.* at 796 (citing *In the Interest of J.C.*, 591 So.2d 315 (Fla. App. 1991)). But, the Georgia Court of Appeals held in *In the Interest of T.A.G.*, 663 S.E.2d 392 (Ga. App. 2008), that where a school resource officer was present during questioning of a student pertaining to suspected criminal activity, any involvement by law enforcement implicates *Miranda* and the exclusionary rule. Other state courts have held that where a school official is acting in an investigatory manner even without police involvement, *Miranda* warnings were required, and confessions by a student to school officials in such circumstances may not be used against the student. *State v. M.A.L.*, 765 P.2d 787 (Okla. Crim. App. 1988).

In this case the sixth circuit merely applied a reasonableness test to determine whether any Fifth Amendment deprivation occurred. In reaching its decision, the sixth circuit did not look to the evidence that Mr. Lacey acted in conformance with a long-standing custom and practice in which school administrators collected confessions from students to be used as charging documents by police. It did not look to the evidence that Mr. Lacey admitted that his sole purpose in obtaining a confession from A.E. was to provide the confession to the police and that he had no school discipline related purpose for obtaining the confession.

B. No Federal or State Court Decisions Have Examined the Interplay of State Statutes Requiring School Officials to Report Suspected Criminal Activity to Law Enforcement and the Fifth Amendment.

As discussed *supra* Kentucky and at least twelve other states require school officials to report suspected criminal activity on school grounds to police. Yet, no reported state court or federal court decisions examine the proper Fifth Amendment protections to be afforded students when state statutes require such reports to law enforcement.

In contrast to the facts in *State v. V.C. and R.S.*, 600 So.2d 1280 (Fla. App. 1992), Mr. Lacey did not inform A.E. that her statement would be turned over to law enforcement, and he did not inform A.E. that the statement could be used against her in juvenile proceedings. Further, Mr. Lacey admitted that he did not tell A.E. that she

could refuse to provide a statement, and he did not inform A.E. that she was free to leave his office.

In addition, unlike the investigation in *State v. J.T.D.*, 851 So.2d 793 (Fla. App. 2003), where the questioning involved only violation of the student code of conduct, Mr. Lacey's admitted purpose in obtaining a confession from A.E. was for juvenile prosecution.

Mr. Lacey's report to law enforcement and his subsequent acts converted the situation into one where he was acting to collect evidence for law enforcement. He knew that law enforcement was involved, but he did not inform A.E. of this fact.

Precedent of this Court supports "the conclusion that questioning by any government employee comes within *Miranda* whenever 'prosecution of the defendant being questioned is among the purposes, definite or contingent, for which the information is elicited.'" *State v. Heritage*, 61 P.3d 1190, 1194 (Wash. App. 2002) (citations omitted). In *Mathis v. United States*, 391 U.S. 1 (1968), this Court held that *Miranda* applied in the context of a civil investigation where an IRS agent was required to refer a case for criminal investigation when indicia of criminal activity was found. Certainly, such a required reporting by an IRS agent for suspected criminal activity is no different than where school officials are required to report suspected criminal activity to law enforcement for investigation.

In fact, "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault*, 387

U.S. 1, 49 (1967). And, based upon this precedent, this Court held that unwarned statements made to a court appointed psychiatrist could not be used against a criminal defendant at sentencing. *Estelle v. Smith*, 451 U.S. 454 (1981).

Yet, the sixth circuit denied A.E. the protections afforded inmates in the prison discipline context, individuals suspected of tax crimes, and persons convicted of crimes at the sentencing stage of trial.

This Court should grant certiorari to determine (1) whether school children should be afforded immunity for statements made to school officials in the school discipline context; (2) the Fifth Amendment protections students are entitled to when school officials act to elicit incriminating statements for use by police officials in conformance with local custom and practice; and (3) what Fifth Amendment protections school children should be afforded in the face of state statutes requiring school officials to report suspected criminal activity to law enforcement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

S.E., as Next Friend of A.E.; T.E., as Next Friend of A.E.; A.E., a minor by and through her Next Friends, S.E. and T.E., Plaintiffs-Appellants, v. GRANT COUNTY BOARD OF EDUCATION; DONALD MARTIN, in his Capacity as Superintendent and Individually; RONALD LIVINGOOD, in his Capacity as Principal of Grant County Middle School and Individually; JAMES LACEY, in his Capacity as Assistant Principal of Grant County Middle School and Individually; CELISA EDMONDSON, in her Capacity as Health Nurse of Grant County Middle School and individually, Defendants-Appellees.

No. 07-6330

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

08a0372p.06; *544 F.3d 633; 2008 U.S. App. LEXIS 21198; 2008 FED App. 0372P (6th Cir.)*

544 F.3d 633, *; 2008 U.S. App. LEXIS 21198, **;
2008 FED App. 0372P (6th Cir.), ***
September 15, 2008, Argued
October 10, 2008, Decided
October 10, 2008, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Eastern District of Kentucky at Covington. No. 06-00124--William O. Bertelsman, District Judge.

S.E. v. Grant County Bd. of Educ., 522 F. Supp. 2d 826, 2007 U.S. Dist. LEXIS 77984 (E.D. Ky., 2007)

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: Kenneth J. Henry, PEDLEY & GORDINIER, Louisville, Kentucky, for Appellants.

Suzanne Cassidy, O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT, Covington, Kentucky, for Appellees.

ON BRIEF: Kenneth J. Henry, PEDLEY & GORDINIER, Louisville, Kentucky, for Appellants.

Suzanne Cassidy, O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT, Covington, Kentucky, for Appellees.

JUDGES: Before: GUY, RYAN, and McKEAGUE, Circuit Judges.

OPINION BY: RALPH B. GUY, JR.

OPINION

[*634] [*2]** RALPH B. GUY, JR., Circuit Judge. Plaintiffs A.E. and her next friends assert state and federal claims against the Grant County Board of Education, Superintendent Donald Martin, Principal Ronald Livingood, Assistant Principal James Lacey, and Nurse Celisa Edmondson, stemming from the actions of school officials in response to seventh-grader A.E.'s sharing of prescription medicine with fellow student S.W. Plaintiffs appeal from the district court's grant of qualified immunity to the individual defendants and its entry of **[*635]** summary judgment for the School District. We affirm.

I.

Both plaintiffs and defendants adopt the statement **[**2]** of facts in the district court's opinion on summary judgment.

A.E., the subject Plaintiff in this lawsuit, was a seventh-grade student at Grant County Middle School in May of 2006. A.E. is bi-polar and suffers from Attention Deficit Hyperactivity Disorder (ADHD). To manage these conditions, she takes Adderall. During the 2004-2005 school year, A.E. received the medication daily at lunchtime. Pursuant to school policies and procedures, A.E.'s medication was maintained in the school nurse's office, where she went each day to receive it.

On May 26, 2005, the last day of school, A.E. went to the nurse's office for her lunchtime administration of Adderall, as she had done for the entire school year. At that time, there were four Adderall

tablets left. The school nurse, defendant Edmondson, returned the remaining four tablets to A.E. in the original container. A.E. requested to return at the end of the school day to pick up the remaining tablets rather than take them to class with her. The nurse told A.E. to take the remaining medicine with her, even though it was the middle of the school day, and advised A.E. not to give any of the tablets to anyone else.

A.E. had nowhere to keep the medication [**3] because she no longer had access to her locker and had neither a purse nor a backpack. Therefore, she gave the medication to her teacher, Mrs. Moore, for safekeeping. The students left the classroom at that time to engage in outside activities. When they returned to the classroom, the teacher returned the medicine to A.E. The students then went to their last class of the day, where there was a different teacher, Ms. Babel. Ms. Babel showed a movie and served refreshments. Ms. Babel was in and out of the classroom during the movie.

It was during this class that another student, S.W., noticed A.E.'s medication container and asked what was in it. S.W. asked for one of the pills. At first, A.E. refused. After continued pressure, however, A.E. relented and gave S. W. one of her Adderall pills.

Approximately two days later, the Assistant Principal, Defendant James Lacey, called T.E. (A.E.'s mother) and asked if she was aware of the events. She responded that A.E. had told her about them when she came home from school that day. Assistant Principal Lacey then informed T.E. that a deputy sheriff would be coming to interview A.E.

about this incident over the summer break. However, T.E. was never [**4] contacted by law enforcement over the summer.

[***3] School resumed on August 11, 2005, and A.E. returned to Grant County Middle School to begin her eighth-grade year. On the first day of school, Assistant Principal Lacey (a Defendant here in his individual capacity) called A. E. to his office and asked her about what happened on the last day of school, May 26, 2005. He was aware at this time that a sheriff's deputy had not contacted A.E. over the summer break.

Assistant Principal Lacey asked A.E. if she remembered the events of the last day of school and required her to write a statement, which she was then required to date and sign. Thereafter, A.E. was sent back to class. Plaintiff claims that she was not informed that she was free to leave the office or that her written statement would be turned over to the police for purposes of charging her with [*636] criminal activity. A copy of the statement was not placed in A.E.'s school file.

Approximately one week after Assistant Principal Lacey met with A.E., he called both A.E. and S.W. to his office. He asked them what had happened on May 26, 2005. A.E. remained silent during this meeting. Assistant Principal Lacey then issued each girl a one-day suspension [**5] and told them they would be subject to a six-month probation through the juvenile justice system. This second meeting was held after A.E. had submitted the written statement that was later given to Officer Osborne.

A.E. and her mother were contacted by a court-designated worker (CDW) and notified of a meeting at juvenile court to be held on October 3, 2005. At that time, A.E. was given the option to enter into a diversion agreement or face formal court proceedings. A.E. chose the diversion program. The record does not detail who was present at the meeting or who presented the options to A.E. *S.E. v. Grant County Bd. of Educ., 522 F. Supp. 2d 826, 827-28 (E.D. Ky. 2007).*

Defendants add in their brief on appeal that Assistant Principal Lacey obtained a written statement from each of the students, A.E. and S.W., and suspended the students from school for a day. The students were referred to the school Resource Officer, Sheriff's Deputy Rita Osborne, who made the determination to consult with a Grant County Juvenile Court Designated Worker (CDW). Ultimately, A.E. was charged in juvenile court with a trafficking violation that was diverted and dismissed after A.E. satisfied her diversion contract. [**6] No charges were brought against S.W.

A.E. and her next friends filed suit in the United States District Court for the Eastern District of Kentucky in June 2006, claiming that the events described above caused A.E. to suffer severe emotional distress and associated physical problems. The fifteen-count complaint alleged a variety of *42 U.S.C. § 1983* claims under federal statutes and the U.S. Constitution, as well as claims under state law. Prior to the district court's ruling on summary judgment, plaintiffs agreed to the dismissal of eight counts in the complaint, which left counts of disability discrimination under § 504 of the Rehabilita-

tion Act, *29 U.S.C. § 794* (Count III), violations of the *Fourth* and *Fifth Amendments* (Counts IV and V), related conspiracy and refusal to prevent counts (Counts VI and IX), and state law claims of negligence (Count X) and negligent supervision (Count XII).

Following oral argument on the parties' cross motions for summary judgment in August 2007, the district court entered a summary order finding, without reasoning, that "all defendants sued in their individual capacities are entitled to qualified immunity." [1] The court allowed certain [***4] supplemental briefing, [**7] and entered its Opinion and Order in October 2007, granting the defendant's motion for summary judgment and denying the plaintiffs' motion for partial summary judgment. The court noted the voluntary dismissal of eight counts by agreement of the parties; dismissed Counts IV, V, VI, and IX "upon the doctrine of *Heck v. Humphrey*," dismissed Count III for plaintiffs' failure to exhaust administrative remedies; and dismissed the state law counts of X and XII without prejudice. This timely appeal followed.

1 Although the order did not contain reasoning, we note that the court suggested it would rule this way during oral argument on the motions.

II.

The district court's entry of summary judgment is reviewed *de novo. Moorer v. Baptist Mem'l Health Care* [*637] *Sys., 398 F.3d 469, 486 (6th Cir. 2005).* Summary judgment is appropriate when there are no issues of material fact in dispute and

the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c).* We must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).* A district court's decision on the question of qualified [**8] immunity is also reviewed *de novo. Thomas v. Cohen, 304 F.3d 563, 568 (6th Cir. 2002).*

A. *Heck v. Humphrey*

In *Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994),* the Supreme Court held that:

> . . . in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a *§ 1983* plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, *28 U.S.C. § 2254.* A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under *§ 1983. Id. at 486-87* (footnote omitted). The requirement that the conviction or sentence has been reversed, expunged, or invalidated is analogous to the similar requirement in the tort of malicious prosecution and is called the "favorable termination" requirement of *Heck.* This ensures that habeas corpus remains the exclusive remedy for criminal defendants who have not ob-

tained a favorable termination [**9] in their criminal proceedings and does not allow duplicative, collateral attack of convictions or sentences through *§ 1983* actions. *See Shamaeizadeh v. Cunigan, 182 F.3d 391, 394-95 (6th Cir. 1999).*

Plaintiffs' first claim on appeal challenges the district court's determination that *Heck* barred their *42 U.S.C. § 1983 Fourth* and *Fifth Amendment* claims, emphasizing that A.E. was neither convicted nor sentenced and that *Heck* is thus inapplicable.

The district court specifically found that the unpublished decision of this court in *Morris v. City of Detroit, 211 F. App'x 409 (6th Cir. 2006)* was "controlling." In *Morris*, the juvenile plaintiff was sentenced to probation, then later brought a *§ 1983* action claiming that his investigation had produced a coerced confession. This court found that "a challenge to a criminal investigation that led to a conviction necessarily challenges the validity of the conviction, and therefore falls within the *Heck* framework." *Id. at 411* (citation omitted). We note that in *Morris*, the plaintiff had been sentenced, unlike in the instant case.

The district court also examined *Gilles v. Davis, 427 F.3d 197 (3d Cir. 2005)*, where the Third Circuit found that the *§ 1983* [**10] claims of a plaintiff who had accepted pretrial diversion were barred by *Heck*. The district court quoted the reasoning in *Gilles*:

[***5] When a criminal defendant is selected for and decides to participate in [a pretrial diver

sion] program, he avoids trial and potential jail time, and receives expungement of the record in exchange for successfully completing a probationary period. . . .

. . . .[The *Heck* doctrine is] equally applicable in this context. [The plaintiff's] underlying disorderly conduct charge and his *§ 1983 First Amendment* claim require answering the same question-- [*638] whether [plaintiff's] behavior constituted protected activity or disorderly conduct. If [the diversion program] does not constitute a favorable termination, success in the *§ 1983* claim would result in parallel litigation over whether [plaintiff's] activity constituted disorderly conduct and could result in a conflicting resolution arising from the same conduct.

Id. at 209. The *Gilles* decision relied on analogous cases in the Second and Fifth Circuits. [2] In accordance with those cases, the district court found that there was no material difference between the diversion entered into by plaintiff, which it deemed was not [**11] a favorable termination, and a conviction resulting in probation. The district court ended this section of its opinion by stating a policy concern noted in many *Heck-related* decisions: "[t]his court also agrees with the authorities holding that it would constitute poor public policy to permit a criminal defendant to obtain lenient treatment by submitting to a benevolent program of this kind and then turn around and sue the arresting officer."

2 *See Taylor v. Gregg, 36 F.3d 453, 455-56 (5th Cir. 1994); Roesch v. Otarola, 980 F.2d 850, 853*

(2d. Cir. 1992); Singleton v. City of New York, 632 F.2d 185, 193-95 (2d Cir. 1980).

The district court also considered a decision from the Eastern District of Kentucky, where the court found that plaintiff's *Fourth Amendment* challenge to her arrest was barred under *Heck* by her agreement to pretrial diversion. *Everage v. Whitaker, No. 05-CV-115-KKC, 2006 U.S. Dist. LEXIS 13434, 2006 WL 782744 (E.D. Ky. Mar. 27, 2006)* (unpublished disposition). *See also Cissell v. Hanover Ins. Co., 647 F. Supp. 757, 758 (E.D. Ky. 1986).* In contrast, in the case of *Butts v. City of Bowling Green, 374 F. Supp. 2d 532, 537 (W.D. Ky. 2005)*, cited by plaintiffs, the court found that whether or not the **[**12]** plaintiff's pretrial diversion agreement constituted a "favorable termination," there had been no criminal conviction and her rights to bring suit under *§ 1983* were not barred by *Heck* (the court also noted that the nature of the plaintiff's claims would not have "impugn[ed] the validity of a conviction, even if she had a conviction").

Plaintiffs convincingly assert that *Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592, 603 (6th Cir. 2007)*[3], *cert. denied, 129 S. Ct. 44, 172 L. Ed. 2d 21, 2008 U.S. LEXIS 6630, 77 U.S.L.W. 3019 (U.S. Oct. 6, 2008) (No. 07-1318)*, supports their position that *Heck* poses no bar to the instant suit, because A.E. was never in custody, was not convicted or sentenced, and was never eligible for habeas corpus relief. Accordingly, they argue she was improperly prohibited from "seek[ing] vindication of her federal rights."

3 *Powers*, decided August 2007, was not discussed in the district court's opinion issued the following October.

The *Powers* plaintiff was convicted and fined for a misdemeanor reckless-driving offense, and subsequently violated his probation when he could not pay the fine. His probation was revoked, and he was required to serve the original 30-day sentence. He later brought [**13] a federal class action lawsuit against the Public Defender Commission for its alleged unconstitutional practice of failing to request indigency hearings on the ability to pay for indigent clients. Because the plaintiff's incarceration was less than 30 days, and impossible to challenge via habeas corpus, we joined with [***6] four additional circuits in "holding that the favorable-termination requirement poses no impediment to Powers's *§ 1983* claims." [4] *Id.*

4 The *Powers* court also held that "Powers is exempt [from *Heck's* favorable-termination requirement] for a second reason." The second reason was because Powers was alleging the violation of his constitutional rights due to improper *procedures*, which could not impact his conviction for reckless driving.

[*639] In *Powers*, we considered the case of *Spencer v. Kemna, 523 U.S. 1, 21, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)*, where a majority of the Court held that the plaintiff maintained the right to bring a *§ 1983* action despite the dismissal of his habeas petition as moot because his period of incarceration was over. We found that *Spencer* demonstrated that the *Heck* bar to *§ 1983* litigation did

not require a favorable termination of the criminal proceedings for plaintiffs who were not [**14] eligible to make habeas petitions. We announced our disagreement with First, Third, Fifth, and Eighth Circuit determinations, including the *Gilles* case, that in spite of the *Spencer* decision, *§ 1983* claimants who were not eligible for habeas relief remained bound by *Heck's* favorable termination requirement. As stated in *Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005)*,

> *Heck* bars *§ 1983* plaintiffs from advancing claims that, if successful, would necessarily imply the invalidity of a prior conviction or sentence. However, if the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed. *Id. at 682.* (Internal quotation marks and citation omitted.) Given the facts of this case, where the plaintiff was neither convicted nor sentenced and was habeas-ineligible, we hold that *Heck* is inapplicable, and poses no bar to plaintiffs' claims.

B. Qualified Immunity/Constitutional Violations

In their argument to the district court on summary judgment, defendants asserted that Assistant Principal Lacey did not violate the *Fourth* or *Fifth Amendments*. These arguments were not addressed [**15] by the district court. As noted above, following oral argument, the district court entered a brief order granting all of the individual defendants qualified immunity. In its later Opinion and Order on the motion for summary judgment, where it found that *Heck* required dismissal of Counts IV, V,

VI, and IX, the court specifically "expresse[d] no opinion on whether the Assistant Principal was acting as an agent of the police to the degree that he was required to administer *Miranda* warnings to the minor plaintiff or on the *Fourth Amendment* claims."

We may consider an alternative ground for granting summary judgment to defendants, if it is "fairly presented by the record, as long as the opposing party 'is not denied an opportunity to respond to the new theory.'" *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson County Metro Human Rels. Comm'n, 508 F.3d 366, 371 (6th Cir. 2007)* (citing *Herm v. Stafford, 663 F.2d 669, 684 (6th Cir. 1981)).* As defendants note, the arguments that constitutional violations did not occur were included in their summary judgment pleadings, and plaintiffs addressed the arguments at that juncture and in their briefs on appeal.

We agree with defendants that Lacey's [**16] actions did not constitute violations of either the *Fourth* or *Fifth Amendments.* Although plaintiffs contend that A.E. was improperly "seized" on August 11, 2005, for the sole purpose of "coercing" her confession to be used in juvenile court proceedings, this is not borne out by the record.

[***7] Both parties have cited to the landmark case of *New Jersey v. T.L.O., 469 U.S. 325,* [*640] *105 S. Ct. 733, 83 L. Ed. 2d 720 (1985),* where the Supreme Court recognized that public school students' rights under the *Fourth Amendment* are not as broad as those of the public. *T.L.O.* dealt with the search of a student's possessions for cigarettes, which led to the school official's discovery of mari-

juana. The Supreme Court found the search was proper, stating that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *Id. at 341.* Plaintiffs point to the distinction drawn in *T.L. O.* between a search "carried out by school authorities acting alone," and those done "in conjunction with or at the behest of law enforcement," *Id. at n.7* (citing *Picha v. Wielgos, 410 Fed. Supp. 1214, 1219-21 (N.D. Ill. 1976))*, and assert that Lacey was acting in conjunction with law enforcement [**17] in taking the actions he did.

Plaintiffs argue that "Lacey acted in conjunction with or at the behest of police within the meaning of *T.L.O.* and *Picha.*" They point T the facts that Lacey reported the incident to law enforcement (as required by Kentucky statute [5] and Grant County Board of Education Policy) and that Lacey took A.E.'s statement or confession "because he knew that Officer Osborne had not interviewed A.E. over the course of the summer after the events of May 26, 2005 had occurred." [6] Plaintiffs also emphasize that the "confession" elicited by Lacey was never placed in A.E.'s school file, but was only taken for purposes of prosecution, and that A.E.'s suspension did not occur until at least a week after the "confession." Their position is that Lacey took the statement in lieu of and in conjunction with law enforcement, implying that Lacey (1) believed less stringent standards applied to his actions than those of law enforcement officers, and (2) had the goal of making an end-run around A.E.'s constitutional rights.

5 See *Ky. Rev. Stats. §§ 158.154* and *158.155. Section 155(8)* provides for immunity from civil or criminal liability for school officials' reporting of proscribed [**18] behavior.

6 Lacey testified at deposition that Officer Osborne had a medical condition during that summer break that prevented her from interviewing A.E.

Defendants quote from Deputy Osborne's deposition testimony concerning school officials' collection of statements from students:

> Q: But your statement was that you have the principals collect statements for you and then you take them and run with --
>
> A: Well, they don't collect them for me. They collect them for their school things, and then I take the copies of the statement and do the criminal end.

Lacey testified at deposition that he did not talk to Deputy Osborne prior to collecting the students' statements. Defendants have cited to numerous federal and state court decisions holding that the sharing of the results of rule violation investigations with law enforcement did not make the school officials agents of law enforcement. [7] Defendants' position is that the [*641] plaintiffs' evidence does not create a question of material fact that constitutional violations occurred.

7 *See People v. Pankhurst. 365 Ill. App. 3d 248, 848 N.E.2d 628, 636, 302 Ill. Dec. 329 (Ill. App. 2006); G.C. v. Bristol Twp. Sch. Dist., No. 05-4800, 2006 U.S. Dist. LEXIS 56108, 2006 WL 2345939 at*

2 (E.D. Pa. Aug. 11, 2006) (unpublished [**19] disposition); *J.D. v. Commonwealth., 42 Va. App. 329, 591 S.E.2d 721, 725 (Va. App. 2004); New Hampshire v. Nemser, 148 N.H. 453, 807 A.2d 1289, 1292 (N.H. 2002); In re Harold S., 731 A.2d 265, 267 (R.I. 1999); In the Matter of: Krystal Nicole Phillips, 128 N.C. App. 732, 497 S.E.2d 292, 294 (N.C. App. 1998); New Hampshire v. Tinkham, 143 N.H. 73, 719 A.2d 580, 583 (N.H. 1998); In re Navaho County Juvenile Action No. JV91000058, 183 Ariz. 204, 901 P.2d 1247, 1249 (Ariz. App. 1995); Jarmon v. Batory, No. 94-0284, 1994 U.S. Dist. LEXIS 8902, 1994 WL 313063, at * 11 (E.D. Pa. June 29, 1994)* (unpublished disposition); *Commonwealth v. Snyder, 413 Mass. 521, 531-532, 597 N.E.2d 1363 (Mass. 1992).*

"[A] school official may detain a student if there is a reasonable basis for believing that the pupil has violated the law or a school rule." *Wofford v. Evans, 390 F.3d 318, 326 (4th Cir. 2004).* [***8] There is no dispute that such a violation occurred here. That detention must be "'reasonably related in scope to the circumstances which justified [it] in the first place.'" *Id. at 326-27* (citing *T.L.O., 469 U.S. at 341*) (quoting *Terry v. Ohio, 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).* Each case, and the reasonableness of the actions taken by school officials, turns on its particular facts. Here, we find that (1) plaintiffs have not produced sufficient evidence [**20] to support the claim that Lacey was acting at the behest of law enforcement when he asked plaintiff S.E. to write a statement, or her "side of the story," concerning the events of May 26, 2005; and (2) the detention was otherwise reasonable.

In this case, a school's assistant principal was contacted by the parent of a student regarding another student's violation of school rules on the final day of the school year. Weeks later, school was again in session, and nothing had been done over the summer break to redress that violation. Summoning the girls to his office to take their respective information about what transpired the previous May, particularly in light of the fact that Officer Osborne had been sick and had not performed the task, does not rise to the level of a *Fourth Amendment* violation in our view.

Concerning plaintiffs' *Fifth Amendment* claim, plaintiffs contend that Lacey conducted his August 2005 meeting with A.E. as an "agent of the Grant County Sheriff's Office." Given our findings above, we conclude that Lacey's actions did not violate the *Fifth Amendment*, as under the circumstances--where Lacey was not acting at the behest of law enforcement, law enforcement officers [**21] were not present, and we have found Lacey's actions under the circumstances to be reasonable--we agree that he was not required to advise A.E. of her *Miranda* rights. *See, e.g., Jarmon v. Batory, No. 94-0284, 1994 U.S. Dist. LEXIS 8902, 1994 WL 313063 (E.D. Pa. June 29, 1994)* (unpublished disposition) (citing *Salazar v. Luty, 761 F. Supp. 45, 47 (S.D. Tex. 1991)*; *Pollnow v. Glennon, 594 F. Supp. 220, 224 (S.D.N.Y. 1984), aff'd, 757 F.2d 496 (2d Cir. 1985)*; and *Boynton v. Casey, 543 F. Supp. 995, 997 & n.4 (D.Me.1982)*). [8]

8 Given that this finding disposes of all of the constitutional claims, we need not discuss the arguments concerning qualified immunity. Addition-

ally, absent any individual liability, the school board was also properly granted summary judgment.

The district court will be affirmed on this basis as to Counts IV, V, VI, and IX.

C. Section 504 Plan

The Rehabilitation Act provides in *§ 504* that

> [n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. *29 U.S.C. § 794(a).*

[**22] When a claim under this statute involves public education, we must consider a provision in the Individuals with Disabilities Education Act (IDEA). The IDEA states that, before bringing claims under other statutes (specifically listing the Rehabilitation Act) seeking "relief that is also available under this subchapter," the administrative procedures in *§ 1415* must be exhausted to the [*642] same extent "had the action been brought under this subchapter." *20 U.S.C. § 1415(l).* That language refers to Subchapter II of Chapter 33 of the IDEA, a detailed provision setting forth procedures to be established by state educational agencies that receive federal assistance, "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to

the provision of a free appropriate public education by such agencies." *20 U.S.C. § 1415(a).*

Plaintiffs' *§ 504* claim states that although defendants developed a "504 plan" for A.E. under *45 C.F.R. § 84.33(b)(1)* and *(2)*, they "routinely, consistently, and purposefully failed to implement [***9] the components of the plan." The claim further asserts that A.E. was improperly denied a due process hearing prior to being subjected [**23] to a "change" in her educational placement.

Although plaintiffs generally do not dispute the statute's pre-suit exhaustion requirement, they argue that the district court's dismissal of the claim on this basis was improper under the circumstances of this case. They cite to *Covington v. Knox County School System, 205 F.3d 912, 917 (6th Cir. 2000)* (holding that only monetary damages could make plaintiff whole for due process violations, where exhaustion would be futile because student had already graduated), and *Joseph M. v. Northeastern Educational Intermediate Unit 19, 516 F. Supp. 2d 424, 438 (M.D. Pa. 2007)* (finding exhaustion requirement futile where plaintiffs requested relief that was unavailable through IDEA administrative process, and IDEA eligibility was not in issue), for the proposition that exhaustion of administrative remedies is not required when it would be futile. They assert it would be futile here, where plaintiff A.E. is now home-schooled. [9]

9 As defendants contend, "parents may not avoid the state administrative process through the unilateral act of removing their child from a public school." *Covington, 205 F.3d at 918* (internal quotation marks and citation omitted). [**24] *See also Doe v. Smith, 879 F.2d 1340, 1343 (6th Cir. 1989)* (finding parents' decision to send student to private school does not excuse failure to exhaust administrative remedies).

While plaintiffs rely on *Covington* in making their argument *against* exhaustion, our reasoning in that case also lends support to the argument *for* exhaustion:

> We disagree that the plaintiff's damages claim alone excuses her from exhausting her administrative remedies. Although the Sixth Circuit has not decided the question, most courts have held that a plaintiff seeking money damages is required to exhaust administrative remedies under the IDEA, even if money damages are not available under the IDEA or through the administrative process. *Covington, 205 F.3d at 916.* Likewise, in *Robb v. Bethel Sch. Dist. # 403, 308 F.3d 1047 (9th Cir. 2002)*, the Ninth Circuit held that "when a plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies, exhaustion of those remedies is required." *Id. at 1048.*

Considering whether the administrative process could address this plaintiff's alleged injuries, we note that plaintiffs' § 504 Plan claim requests entry of [**25] an Order from this Court requiring Defendant Grant County Board of Education to pro-

vide A.E. *with a compensatory education program sufficient to remediate A.E. 's academic deficiencies*, an award of her costs expended herein plus a reasonable attorney fee. (Emphasis added.)

The reasoning of *Robb* applies with equal force to this case. The remediation of A.E.'s academic deficiencies, requested in plaintiffs' complaint, is [*643] initially best addressed by educational professionals through the administrative process. A.E.'s claim will require an assessment of whether the actions complained of here improperly excluded her from or denied her the benefits of the education to which she was entitled, or subjected her to improper discrimination on account of her disability. Unlike the plaintiff in *Covington*, A.E. has not yet graduated, and in fact a part of her claim specifically requests a "compensatory education program." Although plaintiffs' futility argument has some appeal, we find that the issues raised by this litigation are best first addressed by the comprehensive administrative process Congress put in place for resolution of differences in the educational setting. Said process may have in-kind [**26] services and resources [***10] available to it for assistance of students such as A.E. who have been aggrieved in some way by the system. [10]

10 As aptly stated by the First Circuit:

In the administrative state, exhaustion of administrative remedies is generally required. This requirement is more than a matter of form. Insisting on exhaustion forces parties to take administrative proceedings seriously, allows administrative

agencies an opportunity to correct their own errors, and potentially avoids the need for judicial involvement altogether. *P. Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 104 (1st Cir. 1997)* (internal quotation marks and citation omitted). *See also Charlie F., by Neil F. v. Bd. of Educ., 98 F.3d 989 (7th Cir. 1996).*

As defendants point out, "[i]f the administrative review procedures available to A.E.'s family had been utilized, the court below would have had a factual record to weigh in deciding whether or not the Plan had been implemented." Should the district court revisit this issue, a developed record would assist it in making its determination. The district court correctly dismissed this claim without prejudice.[11]

11 The nature of plaintiff's § 504 claim is not crystal [**27] clear. Plaintiffs' Count III allegations could be construed as stating a claim not based simply on defendants' general failure to implement the § 504 educational plan, but stemming more particularly from the consequences of the juvenile proceedings brought against A.E. Plaintiffs allege A.E. was discriminated against because of her disability in violation of *§ 504* in that defendants caused the juvenile proceedings to be brought: (1) without affording her a due process hearing even though the juvenile proceedings effected a change in her educational placement; and (2) without considering whether the behavior that triggered the proceedings was caused by A.E.'s attention deficit or bipolar disorder. Considering the § 504 claim in light of these allegations, it is questionable whether relief would be available under

the IDEA and whether exhaustion of administrative remedies would serve any useful purpose. Under such circumstances, exhaustion of administrative remedies would not be prerequisite to private enforcement of *§ 504* of the Rehabilitation Act. *See Gean v. Hattaway, 330 F.3d 758, 773-75 (6th Cir. 2003)* (affirming dismissal of IDEA claims, but allowing § 504 claim to proceed).

Yet, [**28] even if the § 504 claim were construed in this manner, we would still be constrained to uphold summary judgment for lack of evidence that *defendants* "caused the juvenile proceedings to be instituted." The record is clear that defendants are responsible only for turning over A.E.'s written statement to Officer Osborne. It was Officer Osborne, in concert with the juvenile court designated worker and County Attorney, who decided to formally charge A.E. Hence, *even if* the juvenile proceedings somehow resulted in a violation of A.E.'s rights under the Rehabilitation Act. there appears to be no evidence that the defendants named in this action should be held liable for the violation.

AFFIRMED.

APPENDIX B

Case No. 07-6330

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

S.E., as Next Friend of A.E.; T.E., as Next Friend of A.E.; A.E., a minor by and through her Next Friends, S.E. and T.E.,

Plaintiffs – Appellants

v.

GRANT COUNTY BOARD OF EDUCATION; DONALD MARTIN, in his Capacity as Superintendent and Individually; RONALD LIVINGOOD, in his Capacity as Principal of Grant County Middle School and Individually; JAMES LACEY, in his Capacity as Assistant Principal of Grant County Middle School and Individually; CELISA EDMONDSON, in her Capacity as Health Nurse of Grant County Middle School and Individually,

Defendants - Appellees

Before: GUY, RYAN, and MCKEAGUE, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellants,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

Issued: October 24, 2008

APPENDIX C

S.E., as Next Friend of A.E.; T.E., as Next Friend of A.E.; and A.E., A minor by and through her Next Friends, S.E. AND T.E., PLAINTIFFS VS. GRANT COUNTY BOARD OF EDUCATION; DONALD MARTIN, in his Capacity as Superintendent and Individually; RONALD LIVINGGOOD, in his Capacity as Principal of Grant County Middle School and Individually; JAMES LACEY, in his Capacity as Assistant Principal of Grant County Middle School and Individually; AND CELISA EDMONDSON, in her Capacity as Health Nurse of Grant County Middle School and Individually, DEFENDANTS

CIVIL ACTION NO. 2006-124 (WOB)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, NORTHERN DIVISION

522 F. Supp. 2d 826, 2007 U.S. Dist. LEXIS 77984

October 19, 2007, Decided
October 19, 2007, Filed

SUBSEQUENT HISTORY: Affirmed by S.E. v. Grant County Bd. of Educ., 2008 U.S. App. LEXIS 21198, 2008 FED App. 372P (6th Cir.) (6th Cir. Ky., 2008)

COUNSEL: [**1] For S.E., as next friend of A.E., T.E., as next friend of A.E., A.E., a minor by and through her next friends S.E. and T.E., Plaintiffs: Kenneth J. Henry, LEAD ATTORNEY, Laurence J. Zielke, LEAD ATTORNEY, Pedley, Zielke, Gordinier & Pence PLLC, Louisville, KY.

For Grant County Board of Education, Donald Martin, Individually, Ronald Livingood, Individually, James Lacey, Individually, Celisa Edmondson, Individually, Defendants: Donald J. Ruberg, LEAD ATTORNEY, O'Hara, Ruberg & Taylor, Ft. Mitchell, KY US; Suzanne Cassidy, LEAD ATTORNEY, O'Hara, Ruberg, Taylor, Sloan & Sergent, Covington, KY.

For Donald Martin, in his capacity as Superintendent, Ronald Livingood, in his capacity as Principal of Grant County Middle School, James Lacey, in his capacity as Assistant Principal of Grant County Middle School, Celisa Edmondson, in her capacity as Health Nurse of Grant County Middle School, Official Defendants: Donald J. Ruberg, LEAD ATTORNEY, O'Hara, Ruberg & Taylor, Ft. Mitchell, KY US; Suzanne Cassidy, LEAD ATTORNEY,

O'Hara, Ruberg, Taylor, Sloan & Sergent, Covington, KY.

JUDGES: William O. Bertelsman, United States District Judge.

OPINION BY: William O. Bertelsman

OPINION

[*827] OPINION & ORDER

BERTELSMAN, District Judge:

INTRODUCTION

This **[**2]** matter is before the court on the parties' cross-motions for summary judgment. Oral argument was held on August 3, 2007. At that hearing, Plaintiffs were represented by Kenneth Henry and Hays Lawson. Defendants were represented by Suzanne Cassidy. Official court reporter, Lisa Wiesman, recorded the proceedings.

Following said hearing, additional briefing was ordered and the pending motions were taken under submission. The court, having heard the parties and being otherwise advised, hereby issues the following Memorandum Opinion and Order.

FACTUAL BACKGROUND

A.E., the subject Plaintiff in this lawsuit, was a seventh-grade student at Grant County Middle School in May of 2006. A.E. is bi-polar and suffers from Attention Deficit Hyperactivity Disorder (ADHD). To manage these conditions, she takes

Adderall. During the 2004-2005 school year, A.E. received the medication daily at lunchtime. Pursuant to school policies and procedures, A.E.'s medication was maintained in the school nurse's office, where she went each day to receive it.

On May 26, 2005, the last day of school, A.E. went to the nurse's office for her lunchtime administration of Adderall, as she had done for the entire school year. [**3] At that time, there were four Adderall tablets left. The school nurse, defendant Edmondson, returned the remaining four tablets to A.E. in the original container. A.E. requested to return at the end of the school day to pick up the remaining tablets rather than take them to class with her. The nurse told A.E. to take the remaining medicine with her, even though it was the middle of the school day, and advised A.E. not to give any of the tablets to anyone else.

A.E. had nowhere to keep the medication because she no longer had access to her locker and had neither a purse nor a backpack. Therefore, she gave the medication [*828] to her teacher, Mrs. Moore, for safekeeping. The students left the classroom at that time to engage in outside activities. When they returned to the classroom, the teacher returned the medicine to A.E. The students then went to their last class of the day, where there was a different teacher, Ms. Babel. Ms. Babel showed a movie and served refreshments. Ms. Babel was in and out of the classroom during the movie.

It was during this class that another student, S.W., noticed A.E.'s medication container and asked what was in it. S.W. asked for one of the pills. At first, A.E. [**4] refused. After continued

pressure, however, A.E. relented and gave S.W. one of her Adderall pills.

Approximately two days later, the Assistant Principal, Defendant James Lacey, called T.E. (A.E.'s mother) and asked if she was aware of the events. She responded that A.E. had told her about them when she came home from school that day. Assistant Principal Lacey then informed T.E. that a deputy sheriff would be coming to interview A.E. about this incident over the summer break. However, T.E. was never contacted by law enforcement over the summer.

School resumed on August 11, 2005, and A.E. returned to Grant County Middle School to begin her eighth-grade year. On the first day of school, Assistant Principal Lacey (a Defendant here in his individual capacity) called A.E. to his office and asked her about what happened on the last day of school. May 26, 2005. He was aware at this time that a sheriff's deputy had not contacted A.E. over the summer break.

Assistant Principal Lacey asked A.E. if she remembered the events of the last day of school and required her to write a statement, which she was then required to date and sign. Thereafter, A.E. was sent back to class. Plaintiff claims that she [**5] was not informed that she was free to leave the office or that her written statement would be turned over to the police for purposes of charging her with criminal activity. A copy of the statement was not placed in A.E.'s school file.

Approximately one week after Assistant Principal Lacey met with A.E., he called both A.E. and

S.W. to his office. He asked them what had happened on May 26, 2005. A.E. remained silent during this meeting. Assistant Principal Lacey then issued each girl a one-day suspension and told them they would be subject to a six-month probation through the juvenile justice system. This second meeting was held after A.E. had submitted the written statement that was later given to Officer Osborne

A.E. and her mother were contacted by a court-designated worker (CDW) and notified of a meeting at juvenile court to be held on October 3, 2005. At that time, A.E. was given the option to enter into a diversion agreement or face formal court proceedings. A.E. chose the diversion program. The record does not detail who was present at the meeting or who presented the options to A.E.

Plaintiffs claim that, as a result of the stress of the above described events, A.E. suffered extreme [**6] physical pain as well as emotional distress. Plaintiffs also claim that, due to the extent of A.E.'s emotional suffering, her parents requested that she be placed on homebound instruction for the remainder of the 2005-2006 school year.

Plaintiffs also allege disability discrimination in violation of *§ 504* of the Rehabilitation Act of 1973. A.E. had been tested and determined to be eligible for services and accommodation under *§ 504*. Grant County Middle School developed a "504 Plan" for A.E. to address her needs. However, A.E. and her mother, T.E., claim [*829] that the plan was never fully implemented. Plaintiffs claim that A.E. was not consistently given her Adderall and T.E. was not advised of when and why the medication was

not given. Plaintiffs also claim that the required annual "504 Plan" review meetings either did not happen, or happened too late in the school year to be of benefit to A.E.

Plaintiffs further claim that the alleged failure of Grant County Schools to provide notice and a hearing, prior to causing a juvenile complaint to be filed against A.E., violated her rights under the Rehabilitation Act. Plaintiffs claim that the juvenile complaint constituted a change in her educational [**7] placement. Such a change without due process constitutes a failure of Grant County Schools to provide A.E. with a Free and Appropriate Public Education (FAPE).

Plaintiffs have conceded that discovery has revealed that several of their counts in the Complaint should be dismissed, including Counts I, II, VII, VIII, XI, XIII, XIV, and XV. The counts that remain are Count III (disability discrimination under *29 U.S.C. § 794, § 504* of the Rehabilitation Act), Count IV (violation of *Fourth Amendment* right to be free from unreasonable search and seizure), Count V (violation of *Fifth Amendment* right not to incriminate oneself), Count VI (conspiracy to commit the above), and Count IX (refusing or neglecting to prevent the above). Also remaining are the state law claims of Count X (negligence) and Count XII (negligent supervision).

ANALYSIS

***Plaintiffs' Federal Fourth and Fifth Amendment Claims are Barred by the doctrine of* Heck v. Humphrey**

Plaintiffs bring a *42 U.S.C. § 1983* action against the defendants for damages caused by an alleged violation of her *Fourth Amendment* rights, by reason of being called to the Assistant Principal's office and being required to remain there, and her *Fifth Amendment* [**8] rights, by reason of the Assistant Principal's taking A.E.'s statement, without giving her *Miranda* warnings, knowing it would be used in state juvenile proceedings against her. Upon initiation of the matter in the juvenile court on the basis of the statement, plaintiff entered into a diversion program.

Such programs have different names in different jurisdictions, but they are all a form of anticipatory probation. If the diversion program is successfully completed by the defendant's good conduct for the diversion period (and perhaps by the fulfillment of other conditions), the prosecution is dropped without record. *See* discussion in *Cissell v. Hanover Ins. Co., 647 F. Supp. 757, 758 (E.D. Ky. 1986)* (malicious prosecution). In *Cissell*, this court held that entry in a diversion program was not a favorable termination, as is required for a cause of action for malicious prosecution and for the *§ 1983* action analogous to the same. *Id.*

The doctrine of *Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)*, was unnecessary to the analysis in *Cissell*, but must be adverted to here because this is not a malicious prosecution action. In *Heck*, the Supreme Court held that, where a *§ 1983* action to succeed requires [**9] the court to make a finding that a conviction underlying the action was invalid, the *§ 1983* action is barred. Rather, the plaintiff in the *§ 1983* action

must proceed by habeas corpus. As stated in *Heck v. Humphrey:*

> The common-law cause of action for malicious prosecution provides the closest analogy to [*§ 1983*] claims . . . .
>
> One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. This requirement [*830] "avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [sic] succeeding in the tort action afer having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." Furthermore, "to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit. . . . We think the hoary principle that *civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal* [**10] *judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.*

Id. at 484-6 (citations omitted; emphasis added).

The Court went on to hold that to bring a *§ 1983* action, in which success would "render a conviction or sentence invalid, a *§ 1983* plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court's issuance of a writ of habeas corpus." *Id. at 486.* If the civil suit would impugn the conviction, it must be dismissed. *Id.; Wallace v. Kato, U.S. , 127 S. Ct. 1091, 1098, 166 L. Ed. 2d 973 (2007)* (re-approving the doctrine of *Heck*).

Plaintiffs argue that the doctrine of *Heck* does not apply here because diversion should not be treated as a conviction. This court has twice held that it should, however. *Cissell, 647 F. Supp. at 758; Everage v. Whitaker, No. 05-CV-115-KKC, 2006 U.S. Dist. LEXIS 13434, 2006 WL 782744 (E.D.Ky.)* (false arrest).

Judge Caldwell, in her opinion in *Everage*, cites numerous authorities in support of the conclusion that, [**11] both for malicious prosecution and other *§ 1983* actions, entry into diversion in the underlying criminal case will preclude the *§ 1983* plaintiff's proceeding, unless the diversion can be reopened and set aside. The *§ 1983* plaintiff's pursuing this course is unlikely, however, because it would expose him or her to the criminal prosecution which was avoided by agreeing to the diversion. The plaintiff cannot have her cake and eat it too. In *Everage*, Judge Caldwell quotes the follow-

ing from *Konon v. Fornal, 612 F. Supp. 68, 72 (D. Conn. 1985)*:

> [D]isposition through the accelerated rehabilitation law requires no findings of fact with respect to the defendant's guilt or innocence. However, it is unlikely that the accused will choose disposition pursuant to *section 54-56e* if there was no probable cause for his arrest. . . . *If disposition pursuant to the accelerated rehabilitation law were held to leave open the plaintiff's right to bring a subsequent section 1983 action for false arrest and false imprisonment, fewer prosecutors would be willing to consent to such dispositions. The net result would be that the clear policy behind the accelerated rehabilitation law - to give one accused of a* [**12] *crime not of a serious nature, who would probably not offend in the future, and who is a first time offender, a one-time chance at personal rehabilitation without incurring the risk of a full trial on the merits [of the information] - would be thwarted. In light of these policy considerations, the plaintiff's section 1983 claim for false imprisonment is barred. 2006 U.S. Dist. LEXIS 13434, [WL] at *8, n. 8* (emphasis in the original).

The decision of the Sixth Circuit in *Morris v. City of Detroit, 211 Fed. Appx. 409* [*831] *(6th Cir. 2006)*, is controlling. Similar to the present action, the plaintiff in *Morris* had been sentenced to proba-

tion in the juvenile court following an allegedly unlawful investigation. The *Morris* plaintiff claimed that the investigation culminated in a confession that was alleged to have been coerced.

The *Morris* court held that "a challenge to a criminal investigation that led to a conviction necessarily challenges the validity of the conviction and therefore falls within the *Heck* framework." *Id. at 411* (citing *Dusenbery v. Graves, 187 F.3d 635, 1999 WL 617932 *1 (6th Cir.)* (allegedly false search warrant affidavit)). In the opinion of this court, the sentence of probation in *Morris* is essentially the [**13] same as the diversion agreement in the instant case. [1]

> 1 To the extent the cases cited by plaintiffs are in conflict with this analysis, the court respectfully disagrees with and declines to follow them. *See, e.g., Butts v. City of Bowling Green, 374 F. Supp.2d 532 (W.D. Ky. 2005).* The court notes that this decision was reached prior to the Sixth Circuit decision in *Morris, supra.*

Also directly on point is *Gilles v. Davis, 427 F.3d 197 (3d Cir. 2005).* There, *§ 1983* claims, some based on malicious prosecution and others on alleged *First Amendment* violations, were held to be barred by the *Heck* doctrine, where the plaintiff had accepted pretrial diversion in the underlying criminal case. The court reasoned:

> When a criminal defendant is selected for and decides to participate in [a pretrial diversion] program, he avoids trial

> and potential jail time, and receives expungement of the record in exchange for successfully completing a probationary period. . . .
>
> . . . .
>
> [The *Heck* doctrine is] equally applicable in this context. [The plaintiff's] underlying disorderly conduct charge *and his § 1983 First Amendment Claim* require answering the same question--whether [plaintiff's] behavior constituted [**14] protected activity or disorderly conduct. If [the diversion program] does not constitute a favorable termination, success in the *§ 1983* claim would result in parallel litigation over whether [plaintiff's] activity constituted disorderly conduct and could result in a conflicting resolution arising from the same conduct. *427 F.3d at 209* (emphasis added).

The court, citing many cases, went on to hold that the diversion program did not constitute a favorable determination of the case for the plaintiffs and that all of the *§ 1983* claims, both analogous to malicious prosecution and otherwise, were barred by the *Heck* doctrine.

As stated above, this court sees no distinction for these purposes between diversion, which is anticipatory probation, and probation imposed following a conviction. This court also agrees with the authorities holding that it would constitute poor public policy to permit a criminal defendant to obtain

lenient treatment by submitting to a benevolent program of this kind and then turn around and sue the arresting officer.

Additional Claims Involving the Juvenile Proceedings

The *Heck* issue requires dismissal of all the federal claims pertaining to the alleged unconstitutional [**15] seizure and confession, including Counts IV, V, VI, IX, and X. The court does not reach and expresses no opinion on whether the Assistant Principal was acting as an agent of the police to the degree that he was required to administer *Miranda* warnings to the minor plaintiff or on the *Fourth Amendment* claims.

However, the court will address the Rehabilitation Act claim, to the extent it does not involve the arrest.

[*832] ***Disability Discrimination under 29 U.S.C. § 794 and § 504 of the Rehabilitation Act***

Plaintiffs have alleged claims for disability discrimination and violations of *29 U.S.C. § 794* and *§ 504* of the Rehabilitation Act. These claims are based upon Grant County Middle School's alleged failure to implement her *§ 504* plan, causing a juvenile complaint to be filed against A.E., and for having suspended A.E. without providing a hearing prior to either act. Plaintiffs originally included claims for violations of the Individuals with Disabilities in Education Act (IDEA), but has agreed with Defendant that those claims should be dismissed. Defendant argues that these remaining disability-based claims should also be dismissed be-

cause Plaintiffs have failed to exhaust the administrative remedies [**16] as is required under IDEA. Plaintiffs admit that the exhaustion requirements for the two acts are identical. (Plaintiffs' Response to Motion for Summary Judgment, Doc. # 42, p. 11). Plaintiffs claim, however, that they are not required to exhaust the administrative remedies because A.E. is now being home-schooled and to require exhaustion would be futile.

In *N.L. v. Knox County Schools, 315 F.3d 688 (6th Cir. 2003)*, the Sixth Circuit addressed the purposes of both IDEA and the Rehabilitation Act and stated:

> The purpose of the IDEA is to guarantee children with disabilities access to a free and appropriate public education. Under the IDEA, a school system conducts an initial evaluation to determine if a child qualifies for special education or related services in the form of an Individualized Education Program ("IEP").
>
> . . .
>
> The purpose of *section 504* is to ensure that disabled individuals have the opportunity to participate in or benefit from the aid, benefit, or service of any program receiving federal financial assistance. Programs receiving federal financial assistance include public schools.

Id. at 689-90.

"The IDEA permits plaintiffs to a file a complaint 'with respect to *any matter* [**17] *relating to*

. . . the provision of a free and appropriate public education.' Thus, we have held that whenever a plaintiff brings a claim that is 'educational in nature' purporting to challenge the provision of educational services by a local school district, the claim is 'presumptively redressable' through the IDEA's administrative procedures. This holds true regardless of what statute the plaintiff purports to cite as the basis of the suit." *Ellenberg v. New Mexico Military Institute, 478 F.3d 1262, 1280-81 (10th Cir. 2007)* (internal citations and omission omitted, emphasis in the original).

There are a few narrow exceptions to the exhaustion requirement under the IDEA. *Mallory ex rel. BM v. Knox County School Dist., 2006 U.S. Dist. LEXIS 87832, 2006 WL 3484015 at *7.* Exhaustion is not required where application of the administrative procedures would be futile or inadequate to protect the plaintiff's rights or if the plaintiff did not receive full notice of their rights under the IDEA. *Id.* However, "parents may not avoid the administrative process through 'the unilateral act of removing their child from a public school.'" *Id.* (*quoting Covington v. Knox County Sch. Sys., 205 F.3d 912, 915 (6th Cir. 2000)).* The plaintiff [**18] bears the burden to prove futility. *Id.*

In this case, as in *Mallory*, the claims of the Plaintiff are educational in nature as they seek to redress alleged deficiencies in her free and appropriate education plan.

The Plaintiffs claim that to exhaust the administrative remedies would be futile, because she is now being home-schooled, is without merit. As held in *Mallory*, the [*833] parents' choice to remove

the child from the public school does not remove the exhaustion requirement.

In the present case, the parents chose to home-school A.E. There was no attempt to appeal the actions of the Grant County Middle School via the administrative process that could and may have provided redress for the alleged wrongs.

Based upon the foregoing, Defendant's motion for summary judgment as to Count III must be granted because the plaintiffs failed to exhaust their administrative remedies.

Inasmuch as all of the Federal claims have been dismissed, the court declines to exercise jurisdiction over the remaining state law claims.

Therefore, the court being advised,

IT IS ORDERED as follows:

1. That Defendant's motion for summary judgment (Doc. # 38) be, and it is, hereby **granted;**

2. That Plaintiffs' motion for partial [**19] summary judgment (Doc. # 34) be, and it is, hereby **denied;**

3. That Counts I, II, VII, VIII, XI, XIII, XIV and XV are **voluntarily dismissed,** with prejudice, by agreement of the parties;

4. That Counts IV, V, VI, and IX are **dismissed,** with prejudice, based upon the doctrine of *Heck v. Humphrey;*

5. That Count III is **dismissed,** with prejudice, based upon Plaintiffs' failure to exhaust administrative remedies;

6. That Counts X and XII are **dismissed,** without prejudice; and

7. That a separate Judgment shall enter concurrently herewith..

This 19th day of October, 2007.

Signed By:

William O. Bertelsman

United States District Judge

APPENDIX D

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law
The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees
In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its

discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) **Expert fees**
In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.